Hearing Statement

Submitted by

Neil A. G. McPhie, Chairman

U. S. Merit Systems Protection Board

"The Countdown to Completion: Implementing the New Homeland Security Personnel System"

Subcommittee on the Federal Workforce and

Agency Organization

Committee on Government Reform

United States House of Representatives

The Honorable Jon Porter
Chairman

The Honorable Danny K. Davis
Ranking Member

March 2, 2005

Dear Mr. Chairman,

Thank you for the opportunity to submit this statement for the hearing record regarding the regulations developed by the Department of Homeland Security (DHS) and the Office of Personnel Management (OPM) to implement the employee appeals process under the DHS Human Resources Management System. My remarks will address the impact of these regulations on the Merit Systems Protection Board (MSPB or "the Board"). As mandated by statute, the Board participated in the consultative process with DHS and OPM for developing these regulations. Members of my staff participated in working groups and attended numerous meetings with DHS and OPM representatives throughout this process.

We are pleased that DHS decided to retain the services of the Board for the adjudication of employee appeals. We are confident that we will provide the same high quality of services for which we have become known, even in the compressed timeframes mandated by the DHS appeals system. I believe that, when DHS conducts its evaluation at the end of the regulatory two year period, its officials, managers and line employees will see that retention of the Board as an independent neutral adjudicatory body was the right decision.

While we anticipate the challenges we will face in implementing the appeals process mandated by the new DHS personnel system, we must be realistic about the implications these challenges will present on our existing structure and procedures. Undeniably, there will be significant impact on the Board's operations. Staffing considerations and other resources will require critical adjustments in light of this partnership and our continuing duties and responsibilities in the federal employment arena. The DHS personnel flexibilities, while promulgated specifically for that agency's mission, will present an alteration of the Board's policies and procedures. I would like to describe, to some extent, the way in which we will have to alter our current procedures to accommodate the new DHS system, citing specific provisions. From the Board's perspective, the DHS regulations most significantly impact the Board's current procedures with respect to shortened timeframes, mitigation of penalties and summary judgment.

Shortened timeframes

First, I would like to address the shortened timeframes that will be applied to DHS cases. As a practical matter, the Board may have to create two tracks for adjudication of these cases at the regional and headquarters levels – one for DHS adverse action cases and one for all other cases. It is likely that non-DHS cases will take longer to decide, as new DHS cases may take priority in order to enable the Board to meet the compressed deadlines mandated by the DHS regulations. As such, the Board's traditional system of adjudicating cases on a "first-in, first-out" basis will have to change to facilitate expedited processing of DHS cases.

For example, subsection 9701.706(k)(1) of the DHS regulations modifies the time limit for appeals as set forth in 5 C.F.R. § 1201.22(b), from 30 days after the effective date or receipt, to 20 days after effective date or service, still retaining the "whichever is later" language. Thus, our regional and field offices will have to apply different time limits to DHS adverse action appeals.

Additionally, subsection 9701.706(k)(7) shortens the Board's 120-day standard for the issuance of initial decisions, and requires issuance in 90 days. Moreover, contrary to the current practice of counting from date of receipt, the 90-day period under the DHS regulations is to be counted from the filing date, which generally means postmark or its equivalent. This results in a double burden on the Board's administrative judges.

With respect to appeals involving mandatory removal offenses (MRO), subsection 9701.707(c)(2) requires the Board to render a decision on appeals in mandatory removal cases within 30 days of receipt of a response to a request for MSPB review, or OPM's intervention brief, whichever is later. Under certain circumstances, the Board may extend the deadline by 15 days. MSPB has previously questioned the advisability of placing a limit on the amount of time the Board may take to issue a decision on these cases. In earlier draft regulations, the specified time limit was 20 days for the issuance of a Board decision. The current version provides that such decisions must be issued in 30 or 45 days. It is not clear that this revision provides adequate time for the Board to conduct a thorough review.

A 90-day requirement is also set for decisions by the Board on petition for review, but it is counted from the close of the record date. There is currently no time limit for the issuance of decisions on petition for review and the average age of pending petitions for review at the end of fiscal year 2004 was approximately 141 days. The DHS regulation significantly reduces that time and may require the Board to put DHS cases on a faster track than cases from other agencies which are currently taken in order of receipt.

Mitigation

A second area of concern is the limitation on the Board's authority to mitigate penalties. Pursuant to subsection 9701.706(k)(6), the Board must sustain the penalty imposed by the agency unless it "is so disproportionate to the basis for the action as to be wholly without justification." Currently, the Board reviews the penalty imposed by an agency in accordance with the standard set in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), to ensure that it is "within the range of reasonableness." Under the DHS regulations, if mitigation is found proper, the "maximum justifiable penalty," rather than the "maximum reasonable penalty" provided for by *Douglas*, must be imposed. The implication of this substitution is that DHS will have to meet a much lower threshold to sustain a penalty. In any event, it requires administrative judges and the Board to depart from the familiar penalty standard than has been used for 25 years by the Board and its reviewing court, and of course to develop entirely new precedent under it.

We believe that this mitigation limitation is based on a perception that the Board's practice is to second guess the reasonableness of an agency's penalty decision without giving deference to the agency's mission or the manager's discretion. In fact, the Board considers a number of relevant factors in determining whether a penalty should be sustained, including whether it is within the range of penalties allowed for the offense in the agency's table of penalties. The MSPB only mitigates a penalty if it finds that the penalty clearly exceeds the maximum reasonable penalty. The Board's policy and practice was most recently illustrated in *Casteel v. Department of Treasury*, 97 M.S.P.R. 521 (2004). In that case, the MSPB held that in deciding whether to mitigate an agency's penalty, "the [MSPB] must give due weight to the agency's primary discretion in maintaining employee discipline and efficiency, recognizing that

the [MSPB]'s function is not to displace management's responsibility but to ensure that managerial judgment has been properly exercised." *Id*. at 524. Thus, the MSPB does not take lightly an agency's mission or the discretion of its managers to determine the appropriate penalty for employee misconduct.

Summary Judgment

The third area I would like to address is the Board's new summary judgment authority. Under the DHS regulations at subsection 9701.706(k)(5), the Board is granted the authority to render summary judgment. In fact, under these provisions, the Board is required to render a summary judgment on the law without a hearing, when there are no material facts in dispute. Currently, the Board does not have summary judgment authority. This new authority will be helpful in expediting the adjudication of cases, although it may also prove controversial in that civil servants' long-held right to a hearing after discharge has been eliminated.

Provisions that may delay adjudication

The DHS regulations will have wide-reaching impact on the Board's adjudicatory procedures. In several instances, however, we are not certain that these procedural changes will facilitate the expedited process that DHS seeks. Specifically, it appears that the provisions governing OPM's right to intervene, the requirement of a separate settlement judge, and the right to challenge a party's representative, may increase the time it takes the Board to adjudicate DHS cases.

Subsection 9701.706 (e) permits the Director of the OPM to intervene, as a matter of right, at any time in an MSPB proceeding where the Director believes that an erroneous decision will have a substantial impact on a civil service law, rule, regulation or policy directive. The current rules as specified in 5 U.S.C § 7701(d), 5 C.F.R. § 1201.34(b) and 5 C.F.R. § 1201.114(g) require the Director of OPM to intervene as early in the proceeding as practicable, and they limit his or her right to do so to situations where he or she perceives that there will be substantial impact on any civil service law, rule, or regulation "under the jurisdiction of [OPM]." DHS's regulation does not contain either limitation. This change, therefore, may result in an increase in the number of interventions filed by OPM, and with that, the Board's workload.

Second, subsection 9701.706(i) modifies 5 C.F.R. § 1201.41(c), which allows the administrative judge assigned to hear the case to "initiate" settlement discussions "at any time." Under the DHS provision, the AJ is not explicitly prohibited from raising settlement, but the parties must agree before settlement may be discussed. Further, any Board involvement in settlement discussions must be by a judge who will not adjudicate the case if settlement is not reached. This change will require the Board's regional offices to allot additional staff resources to each case in which settlement discussions are approved by the parties.

Another significant change in the procedures is necessitated by subsection 9701.706(k)(2) regarding the disqualification of representatives. Under the Board's regulation at 5 C.F.R. § 1201.31(b), a motion to disqualify a party's representative must be based on a conflict of interest or position and be filed within 15 days after the date of service of the notice of designation. The DHS regulation does not limit the reasons on which a motion may be based or

set a time limit for filing the motion. This change may result in longer proceedings because it permits disruption in the adjudication of the merits of any case at any time to permit challenges to a party's representative.

Provisions that affect operations

The DHS regulations governing discovery, case suspensions and OPM requests for reconsideration will also have a significant impact on the Board's operations.

Discovery

Subsection 9701.706(k)(3) modifies the Board's discovery procedures found at 5 C.F.R. § 1201.73(c)(1) by requiring the parties to consult before filing a motion to limit discovery. Additionally, it reduces the limits set in the Board's regulations at § 1201.73(e) on the number of interrogatories a party may submit and the number of depositions it may compel. Given these limits, it is more likely that the administrative judges will have greater involvement in the discovery process, which is generally a matter for the parties, not the administrative judge. Finally, this subsection specifies a standard of proof, both "necessity and good cause," that the administrative judge must apply in considering whether to grant a request for additional discovery. Currently Board administrative judges consider the circumstances of each individual case in making such discovery rulings, without applying a "necessity and good cause" standard.

Case Suspension

The DHS regulation at subsection 9701.706(k)(4) nullifies the Board's regulation at 5 C.F.R. § 1201.28(b) by requiring that all requests for case suspensions be jointly submitted. The Board's current regulation permits an administrative judge to grant a unilateral request for a case suspension. Requiring that such requests be jointly submitted effectively gives the non-moving party the authority to block a request that is based on a legitimate reason, such as illness of a party or representative.

OPM reconsideration requests

The DHS regulation at subsection 9701.706(k)(8), which concerns OPM reconsideration requests to the Board, requires the Board's decision on a reconsideration request to explain its reasons. MSPB understands DHS's need for information about the bases for the MSPB's denial, and would of course take steps to ensure that this information is made known in the Board's decisions. In fact, the Board has almost always issued a fully explanatory Order & Opinion in these cases. However, not all OPM requests for reconsideration present new arguments, and as a result, in some cases, the rule appears to require MSPB to repeat information already set forth in its earlier decision. The need to do so could require unnecessary work that might delay issuance of the reconsideration decision. For these reasons, as to OPM reconsideration requests, I respectfully submit that the MSPB should be able to issue a decision whose length and scope are appropriate to the circumstances of each specific case.

Mandatory Removal Offenses

Finally, I would like to raise two additional points regarding the procedures governing the adjudication of appeals involving mandatory removal offenses (MRO). The first such point concerns subsection 9701.707(c)(4). This subsection provides that "If MSPB does not issue a final decision within the mandatory time limit [30 or 45 days], MSPB will be considered to have denied the request for review of the Mandatory Review Panel's (MRP) decision, which will constitute a final decision of MSPB and is subject to judicial review in accordance with 5 U.S.C. 7703."

This provision is not consistent with the law. The Homeland Security Act of 2002 does not authorize DHS to confer jurisdiction on the U.S. Court of Appeals for the Federal Circuit over appeals from DHS decisions. When the MSPB fails to act on a petition for review of an MRP decision within a stated time, that MRP decision does not constitute the decision of the MSPB. It is unlikely that the Federal Circuit would take jurisdiction over an appeal when there has not been a final MSPB decision, although that determination is for the court to make. *See* 5 U.S.C. § 7703(a) ("[a]ny employee or applicant for employment adversely affected or aggrieved by *a final order or decision of the Merit Systems Protection Board* may obtain judicial review of the order or decision") (emphasis supplied).

Second, subsection 9701.707(d) provides that if a mandatory removal offense is not sustained, DHS may bring a second, non-MRO action against the employee based on the same conduct and on evidence that was not a part of the initial record. The possibility that an employee would be subject to multiple actions based on the same underlying conduct raises a substantial question of fundamental fairness. *Cf. Byers v. Department of Veterans Affairs*, 89 M.S.P.R. 655, ¶ 19 (2001) (an employee may not be disciplined more than once for the same conduct). Additionally, a second disciplinary action based on the same conduct after the MRP issued a decision in favor of the employee could lead to inefficiency and a waste of resources. If the MRP is not deemed to be sufficiently independent of DHS for collateral estoppel purposes, *see Wright v. Department of Transportation*, 89 M.S.P.R. 571 (2001), neither party would be precluded from relitigating (in a second action) all of the issues that were decided by the MRP.

Conclusion

Mr. Chairman, the Board's role in the success of the new DHS appeals system will depend, to a large extent, on the Board's ability to meet the increased demand for expedited case processing with an already lean staff and budget. To this end, the Board will seek additional resources to ensure that it meets the needs of DHS while continuing to deliver high quality services to all other Federal agencies within our jurisdiction. The Board will have to revise its own regulations to integrate the DHS procedures including the shortened timeframes, limitations on discovery, summary judgment and other changes discussed earlier in my statement. It should be noted that, while the new DHS system will require the Board to expedite the adjudication of adverse action appeals and process those appeals under regulations that differ in significant respects from the Board's current regulations, the Board will continue to adjudicate appeals from DHS employees under several laws (e.g., the Whistleblower Protection Act; the Uniformed Services Employment and Reemployment Rights Act; and the Veterans Employment Opportunities Act) through the Board's current procedures.

All aspects of the Board's operations will be affected by these new procedures. The most immediate impact will be the need for Board administrative judges and headquarters attorneys to receive training in the new system. We will likely need additional administrative judges in the regional and field offices to handle the expedited timeframes required by these procedures and to deal with the revised settlement procedures that will require involvement of two administrative judges on one case when settlement discussions are not successful. Similarly, additional attorneys will be needed in headquarters to facilitate the shortened timeframe for issuing decisions on petitions for review. From an information technology standpoint, all of the applications supporting the MSPB appeals process will need to be evaluated and changed, as necessary, to support the new DHS procedures. It is anticipated that additional staff will be needed to develop and support the necessary application changes. Our statutory studies function is also impacted and we will likely need additional analyst positions to evaluate the impact of these broad DHS human resources system changes.

In conclusion, MSPB took its consulting role very seriously, meeting frequently with representatives of DHS and OPM as they developed this appeals system. We provided comments and written responses to draft regulations. After numerous hours of consulting and participating in working groups with DHS, the results were that DHS decided to keep MSPB as the adjudicator of employee appeals, with modified and expedited processes. We believe that our willingness to make changes in our system to expedite the DHS appeals process made the prospect of using our adjudicators more attractive to DHS than the alternative of developing an in-house adjudication system. We look forward to working with DHS to ensure the success of its new personnel system.

Mr. Chairman, again, I appreciate the opportunity to share my views on these significant changes to an important aspect of Federal human resources management. I hope that this information will be helpful to you and your committee members.